IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 10 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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BHIKUBHAI ANAKBHAI BAYAL
Versus
STATE OF GUJARAT THRO P.P.

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Appearance :
MR ZUBIN F BHARDA for the Petitioner
MR HL JANI, ADDITIONAL PUBLIC PROSECUTOR for the Respondent

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 10/01/2007

ORAL JUDGMENT

1. Petitioner – original accused in Criminal Case No.127 of 2003 is before this Court being aggrieved by order passed by the learned Judicial Magistrate First Class, Kodinar (“JMFC”, for short) below application

Exh.26 dated 28.12.2006.

1.1 Application Exh.26 was filed seeking a direction from the Court that the documents mentioned therein, 9 in number, be produced by the complainant side as the same are in their possession. The application was filed on 13.10.2006. The same was considered by the learned JMFC in detail and was rejected by order under challenge.

2. The facts of the case are that the petitioner – accused is alleged to have committed an offence under Section 409, 464, 465, 471 and 477-A of the Indian Penal Code, for which a complaint is registered at Kodinar Police Station being I-C.R.No.77 of 2002. The same was investigated and after investigation was over, charge sheet was filed. After filing of the charge sheet, the present petitioner – original accused appeared before the Court, at that time, he was supplied copies of the police papers. After following necessary procedure, on 02.07.2003, vide Exh.13, charge was framed against the present petitioner – accused. The statement of the accused was recorded wherein , he pleaded, 'not guilty' and opted for the trial, the case was proceeded.

3. It is after 3 years that an application under Section 239 of the Code of Criminal Procedure (“the Code”, for short) Exh.23 application was filed, seeking

discharge. It is after filing the said application – Exh.23 that the present application Exh.26 is filed. It is stated in this application that the documents mentioned therein are required in reference to the application Exh.23 so that the plea for discharge could be supported with the help of these documents.

4. Mr.Zubin F.Bharda, learned Advocate for the petitioner vehemently argued that, the learned JMFC has erred in recording in paragraph No.4 of the impugned order that, 'the petitioner – accused has not filed any application seeking discharge'.

4.1 What is recorded in paragraph No.4 of the order is, the procedure followed in a Criminal Case. It is recorded that as provided under Section 207 of the Code, copies of the police papers are to be supplied to an accused. It is also noted by the learned JMFC that in case the papers (police papers) are in bulk then the Court may as well order for inspection of papers rather than supplying of the copies thereof.

4.2 The learned JMFC then proceeds to consider the provision of Section 227 of the Code, under which the Court, after taking into consideration the charge sheet, documents and the case of the prosecution, if comes to the conclusion that there is no case made out against the

accused, can discharge the accused.

4.3 It is after recording the aforesaid procedural aspect that the Court says that, "**at this stage**", meaning thereby that at the relevant time, i.e. at the time of framing of the charge, there was no application filed by the present petitioner – original accused seeking discharge.

4.4 Learned Advocate Mr.Bharda for the petitioner vehemently argued that the Court has recorded two contradictory findings in its order, viz. in paragraph No.4 it has recorded that no application for discharge is filed, whereas in paragraph No.2, it is recorded that application under Section 239 of the Code – Exh.23 is filed seeking discharge.

4.5 The submission of Mr.Bharda is misplaced. The learned Advocate without appreciating the reference to context of paragraph No.4, has made this submission. The learned JMFC in paragraph No.4 of the order recorded that, "**at this stage**", meaning thereby at the relevant time the accused had not filed any application for discharge.

5. It is a fact that the petitioner – accused after waiting for long 3 years (to be precise as calculated by

the learned JMFC, 2 years, 11 months and 28 days – 2 days short of 3 years), the application Exh.23 is filed seeming discharge under Section 239 of the Code. Thereafter, the present application Exh.26 is filed.

6. The learned JMFC has discussed in detail the provisions and has rightly come to the conclusion that no prejudice is going to be caused to the petitioner – accused by rejection of this application because his defence is not going to adversely affected, as he will be having sufficient opportunity to get these documents and refer to them at an appropriate stage.

7. The learned JMFC has referred to a decision of the Hon'ble the Apex Court in the matter of **STATE OF ORISSA VS. DEBENDRA NATH PADHI**, reported in AIR 2005 Supreme Court 359. The learned JMFC has recorded that the Hon'ble the Apex Court has held in the aforesaid decision that, until the stage of defence of the accused is reached, the accused cannot ask for the documents.

7.1 The Hon'ble the Apex Court while considering Section 227 of the Code and Articles 21 and 14 of the Constitution of India, is pleased to observe as under:

> “The expression "the record of the case" is used in S. 227 of the Code. Though the word "case" is not defined in the Code but S. 209 throws light on the

> interpretation to be placed on the word. Section 209 which deals with the commitment of case to Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit "the case" to the Court of Session and send to that Court "the record of the case" and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in S. 227 relate to the case and the documents referred in S. 209. That is the plain meaning of S. 227 read with S. 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial. The material as produced by the prosecution alone is to be considered and not the one produced by the accused.”

7.2 It was argumed before the Hon'ble the Apex Court that the procedure deprives the accused to seek discharge at the initial stage by filing unimpeachable and unassailable material of sterling quality and hence, is illegal and violative of Articles 21 and 24 (sic – 14) of the Constitution of India. But then, the same was not accepted by the Hon'ble the Apex Court. The Hon'ble the Apex Court observed as under:

> “Contention of accused that the procedure which deprives the accused to seek discharge at the initial stage by filing unimpeachable and unassailable material of sterling quality would be illegal and violative of Arts. 21 and 24 (sic – 14) of the Constitution cannot be accepted. The reliance on Arts. 14 and 21 is misplaced. At the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by S. 227 is to be understood. It only means hearing the submission of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression "hearing the submissions of the accused" cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.”

7.3 In the very same judgment, the Hon'ble the Apex

Court also considered the provisions of Section 91 of the Code along with Sections 227 and 228 of the Code. The Hon'ble the Apex Court observed as under:

> “Any document or other thing envisaged under S. 91 can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code." The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen **with reference to the stage** when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking S. 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under S. 91 would ordinarily not come **till the stage of defence**. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under S. 227 what is necessary and relevant is only the record produced in terms of S. 173 of the Code, the

> accused cannot at that stage invokes S. 91 **to seek production of any document to show his innocence**. Under S. 91 summons for production of document can be issued by Court and under a written order an officer-in-charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof. Jurisdiction under S. 91 of the Code when invoked by accused the necessity and desirability would have to be seen by the Court in the context of the purpose - investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry."

8. Learned Advocate Mr.Bharda for the petitioner relied upon a decision of the Bombay High Court in the matter of **SHRI PRAVIN KUMAR VS. STATE**, reported in 2006 (2) Crimes 530 in support of his submission that the learned Judge has committed an error in rejecting the application under Section 91 praying for production of certain documents.

8.1 The decision of the Bombay High Court has no relevance to the facts of the present case inasmuch as, in the present case, the learned JMFC has recorded in terms that the application is given after 3 years of the framing of the charge and at the time when the evidence

of the prosecution is in the process of being recorded. The learned JMFC has also recorded that by rejection of the application, no prejudice is caused to the accused inasmuch as, he will have all the opportunity to get these documents and refer to them when his turn comes.

9. In view of the aforesaid discussion, present revision application found without any substance, is rejected.

(RAVI R.TRIPATHI, J.)

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